92-1407

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1992

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PATRICIA WILLIAMS HOWARD,

Appellant,

vs.

WOLFF BROADCASTING COMPANY,

Appellee

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ON APPEAL FROM THE SUPREME COURT OF ALABAMA

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

The ultimate question presented for review is whether the Alabama Supreme Court applied the common-law doctrine of at-will employment in an unconstitutional manner, such that future interpretations of the law in question will allow an employer hide behind the veil of this doctrine to discharge employees for impermissible reasons. Specifically: Did the Alabama Supreme Court deny Appellant's Constitutionally-guaranteed right to Equal Protection of the Law in rendering its decision in the case below?

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## OPINIONS BELOW

On September 1, 1991, the Circuit Court of Conecuh County, Alabama granted Appellee's Summary Judgment as to Appellant's cause of action. In its order, the Circuit Court denied Appellant any remedy for the egregious actions taken by Appellant, her former employer, regarding her termination . A copy of the Order is attached as Appendix A.

Appellant appealed the order of the Circuit Court of Conecuh County to the Supreme Court of Alabama. Upon hearing the arguments of both parties, the Alabama Supreme Court affirmed the ruling of the Circuit Court of Conecuh County. The opinion of the court has not yet been released for publication, but is currently cited as 1992 WL 341847 (Ala), November 25, 1992. A copy of the Opinion is attached as Appendix B.

## JURISDICTIONAL STATEMENT

Appellant seeks to establish a public policy exception to the application of Alabama's common law doctrine of at-will employment regarding her particular cause of action. The November 25, 1992, ruling of the Alabama Supreme Court has denied Appellant the benefit of her Constitutionally-guaranteed right to Equal Protection under the Law. Appellant, in filing this petition for Writ of Certiorari, seeks to overturn the ruling of the Supreme Court of Alabama. This Court's jurisdiction is invoked under 28 USC § 1257(a) and 28 USC § 2101(c).

## FEDERAL PROVISIONS AT ISSUE

The following Constitutional and statutory provisions are at issue in this case:

The United States Constitution, Amendment XIV, Section 1, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 2000e(b), which states:

> The term "employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person, but such term does not include \
> (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership

> club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 USC § 2000e-2(a), which states:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

Appellant is a former disc jockey who lost her job solely because she is female. Appellee is her former employer, a radio station licensed to operate under FCC regulations and located in the State of Alabama.

Appellant was hired by Appellee in the fall of 1987. During the hiring process, Appellant noted a sign in the offices of Appellee which contained a statement of its equal employment policies. Appellant interpreted the content of the sign in question to state that Appellee would not discriminate against females, blacks, or any others. However, Appellant lost her job on January 26, 1988, when the Station Manager, Appellee's agent, informed her that she was fired. When Appellant questioned him as to the reason for her termination, the agent stated that the owner's wife did not want any females on the air at her husband's radio station. Appellee's acts and its discriminatory rationale were subsequently documented in a typed letter and signed by the agent in question.

At the time Appellant was terminated, Appellee only employed seven (7) persons. As such, Appellant was without a specific remedy under applicable Federal Civil Rights legislation. Further, the State of Alabama has not enacted a Civil Rights Act of its own. Therefore, Appellant was forced to initiate any legal action in response to her wrongful termination under the laws of the State of Alabama. Thus, on October 2, 1989, she filed a Complaint in the Circuit Court of Conecuh County against Appellee for Fraud and Breach of Contract, and against Karen Wolff, the station owner's wife, for Intentional Interference with Business Relations. Although Appellant's Complaint did not specifically allege an action sounding in sexual discrimination under 42 USC § 2000e *et seq.*, the gravamen of such Complaint was the wrongful and discriminatory acts of her former employer. For example, in Appellant's Introductory Allegations, she avers that "[o]n or about October 1,

1987, Plaintiff was hired by Defendants Wolff Broadcasting, Doe No.1 and/or Doe No.3, to perform the duties of a disc jockey. When Plaintiff applied for that job, Defendants represented to her that they were an equal opportunity employer, and therefore would not discriminate against their employees on the basis of race, sex, religion or national origin. Plaintiff relied on that representation, and accepted a job with Defendants as a disc jockey. Nevertheless, on or about January 26, 1988, Plaintiff was terminated solely because she was a female. She was terminated after Defendant, Karen Wolff, who was the wife of the owner of Wolff Broadcasting, insisted that Plaintiff be terminated because she did not want females working as disc jockeys for Wolff Broadcasting. Further claims stated (1) that "Defendants Wolff Broadcasting, Doe No.1 and/or Doe No. 3, expressly represented to Plaintiff when hiring her that she would not be discriminated against on the basis of sex. Said representation was false and was known by Defendants to be false when made. Plaintiff reasonably relied on said representation to her detriment. She accepted employment with Wolff Broadcasting, and continued to work believing that she would not be terminated or discriminated against on the basis of her sex;" (2) that "Defendants, Wolff Broadcasting, Doe No.1 and/or Doe No.3, expressly represented to Plaintiff when she applied for the job that she would not be discriminated against on the basis of sex;" (3) that "[o]n or about January 26, 1988, Plaintiff was discharged from her employment with Defendants Wolff Broadcasting, and Doe No.1 and/or Doe No. 3, because Defendant Karen Wolff and/or Doe No. 2 insisted that no females be employed as disc jockeys by Defendant Wolff Broadcasting. Said discharge

from employment constitutes a breach of contract, and a breach of Defendants' express promises to Plaintiff that Plaintiff would not be discriminated against or terminated from employment on the basis of sex;" and (4) that "[o]n or about January 26, 1988, Plaintiff was discharged from her employment with Defendant Wolff Broadcasting when Karen Wolff and/or Doe No. 2 insisted that the owner of Wolff Broadcasting fire Plaintiff because she was a female."

On June 17, 1991, after the pleadings in this case were closed and discovery was conducted, Appellee filed and served its Motion for Summary Judgment, arguing that Appellant's remedy lay in the Federal court system, as an action under Title VII of the Civil Rights Act. In fact, Appellee stated, in its Brief in Support of Summary Judgment, that "the thrust of Plaintiff's Complaint is a violation of 42 USC § 2000e-2." In her Response to said Motion for Summary Judgment, Appellant stated that "at the time of the firing Wolff Broadcasting only had seven (7) employees. Because of that fact, the Equal Employment Opportunity Commission did not have jurisdiction over Patricia Howard's cause of action...Plaintiff, Patricia Howard, did not have jurisdiction to file a claim with the EEOC. *See* 42 USC § 2000e-2." Appellant also stated that "[o]n January 26, 1988, while Patricia Howard was on the air, Keith Holcombe, the station manager, drove to the radio station and informed her that she was fired. When he fired her, Mr. Holcombe told her that she was being fired because Karen Wolff, the owner's wife, did not want any females on the air." In her Response to Appellee's Motion for Summary Judgment, Appellant also argued that the Circuit Court of Conecuh County,

Alabama, should create a public policy exception to the common law at-will employment doctrine, urging that "[d]iscrimination on the basis of race, color, sex, religion, and/or national origin has been recognized as one of the evils of American society that must be eliminated. 42 USC § 2000e-2 specifically prohibits this type of discrimination. There is absolutely no justification for this abhorrent act. It is for this type of act that a public policy exception should be created. A strict interpretation of the employment-at-will doctrine is an antiquity of injustice that should be replaced by exceptions that further the stated public policy of this country and state."

After both parties submitted their evidence and briefs, Summary Judgment was entered in Appellee's favor at a hearing occurring on July 2, 1991. In its Order, the Circuit Court for Conecuh County stated that "...the decision of the Court regarding the employment contract, i.e. that it was an 'at will' contract, means that the Plaintiff could be fired for a good reason, a bad reason, or no reason at all..." The Circuit Court also held that it was unable to allow Appellant to proceed with her case under a public policy exception to the at-will employment doctrine, stating "[t]his court is unable to do so, having considered the numerous precedents established by the Supreme Court of Alabama disallowing a 'public policy' exception to the 'at will' doctrine..." Upon the Circuit Court's granting of Appellee's motion, Appellant entered into a Pro Tanto Release and Settlement Agreement with Defendant Karen Wolff on October 9, 1991, and the Circuit Court of Conecuh County entered an Order making the judgment final as to all parties on November 12, 1991.

Appellant filed a timely Notice of Appeal with the Supreme Court of Alabama on December 26, 1991. The subsequent appeal asked the court to reverse the entry of Summary Judgment in Appellee's favor. The Alabama Supreme Court released its opinion on November 25, 1992. In its opinion, the court upheld the decision of the Circuit Court of Conecuh County on all grounds asserted. Notably, the Alabama Supreme Court declined to carve out a public policy exception to the common law doctrine of at-will employment, as such body of law exists in Alabama, stating that "this Court has so far declined to judicially create a public policy exception to the employment 'at-will' doctrine." The court also announced that "[t]he Court has consistently refused to create a cause of action for wrongful discharge on 'public policy' grounds, for three reasons: (1) to do so would abrogate the inherent right of contract between employer and employee; (2) to do so would be to overrule well-established employment law; and (3) 'contrary to public policy' is too vague or nebulous a standard to justify creation of a new tort." Although the Alabama Supreme Court stated that it "should not be understood as condoning a person's discharge because of gender," it has, in effect, sanctioned the termination of employees who share Appellant's plight--being a female, at-will employee of a small employer. It is believed that the Alabama Supreme Court's ruling of November 25, 1992 will lead to further violations of employees' rights to Equal Protection of the Law in the future. Such are the reasons for Appellant's present petition.

## ARGUMENT

In this appeal, Appellant requests that this Court grant Certiorari to hear her claims sounding in Equal Protection and sex discrimination. The basis for such appeal lies in the November 25, 1992, ruling of the Alabama Supreme Court, which declined to grant her remedy or relief for injuries caused by the discriminatory acts of Appellee, her former employer. In upholding the Circuit Court of Conecuh County's Order granting Appellee's Motion for Summary Judgment, the Alabama Supreme Court has denied Appellant her right to Equal Protection of the Law, as is guaranteed her by the Fourteenth Amendment of the United States Constitution.

In its Opinion, the Alabama Supreme Court held that it would not create a public policy exception to the common law doctrine of at-will employment as it now exists under Alabama law. The State court announced that, "[o]n the public policy issue, the Congress of the United States has elected to exempt Wolff from the provisions of law relating to discrimination in employment. While we recognize that under the provisions of 47 CFR § 73.2080, Wolff is prohibited from discriminating on the basis of sex, we do not think, especially in view of the principle stated in *Hinrichs*, that we should judicially create a wrongful discharge action based on 'public policy' grounds in this case involving a licensee of the FCC." Thus, the highest court in the State of Alabama has identified and recognized the issue in question as one of sex discrimination. In fact, the first sentence of the Opinion states "[t]he plaintiff was fired by Wolff Broadcasting Corporation ("Wolff") solely

because she was a female." However, the State court refused to grant the victim any sort of relief or remedy, denying Appellant of her right to Equal Protection of the Law.

The Alabama Supreme Court's ruling was based on the common-law doctrine of at-will employment. Under that body of law, an employer can fire an employee-at-will for any reason, whether it is a good reason, bad reason, or no reason. *See Salter v. Alfa Insurance Co., Inc.*, 561 So.2d 1050 (Ala. 1990); *Montgomery v. Big B, Inc.*, 460 So.2d 1286 (Ala. 1984); *Hinrichs v. Tranquilaire Hospital,* 352 So.2d 1130 (Ala. 1977). However, an employer is limited to the confines of lawful actions in exercising its right to terminate such an employee. In the case of *Tennessee Coal, Iron & Railway Co. v. Kelly,* 163 Ala. 348, 50 So. 1008 (1909), the Alabama Supreme Court, in explaining both the at-will employment doctrine and the common law action of intentional interference with contractual relations, held that "[i]f one does an act which is legal in itself and violates no right of another, the fact that this rightful act is done from bad motives or with bad intent toward the person so injured does not give the latter a right of action against the former. Therefore, if the defendant's acts complained of ... were legal in themselves, and violated no superior right of the plaintiff, they were not actionable." *Id* at 1010. Such limitation has been recognized throughout the history of the at-will employment doctrine. *See Salter v. Alfa Insurance Co.,* Inc., *supra,* at 1052; *Finley v. Beverly Enterprises, Inc.,* 499 So.2d 1366, 1367 (Ala. 1986); *Williams v. Killough,* 474 So.2d 680, 682 (Ala. 1985); *Johnson v. Gary,* 443 So.2d 924, 926 (Ala. 1983); *Martin v. Tapley,* 360 So.2d 708,

709 (Ala. 1978); *Hinrichs v. Tranquilaire Hospital, supra,* at 1131; *Comerford v. International Harvester Co.,* 235 Ala. 376, 178 So. 894 (1938); *United States Fidelity & Guaranty Co. v. Millonas,* 206 Ala. 147, 89 So. 732, 735 (1921). 42 USC 2000e-2(a) mandates that employment discrimination on the basis of sex is unlawful. Therefore, Appellee had no right to discharge Appellant under the at-will employment doctrine, or any other legal theory. It logically follows that the Courts of the State of Alabama should not have upheld and legitimized such actions. Likewise, this Court should not condone the activities of employers such as Appellee or judicial pronouncements such as the one at issue.

By its express terms, the protection guaranteed by the Fourteenth Amendment of the United States Constitution are limited to actions taken by a State itself. U.S. CONST. AMD. XIV, § 1. It has been held that judicial action in private disputes is a form of state action sufficient to bring a claim within the application of the Equal Protection Clause. *See Business Executives' Move for Vietnam Peace v. FCC,* 450 F.2d 642 (DC Cir. 1971); *Henry v. First National Bank of Clarksdale,* 444 F.2d 1300 (5th Cir. 1971); *Edwards v. Habib,* 397 F.2d 687 (DC Cir. 1968); *New York Times Co. v. Sullivan,* 376 US 254, 84 S.Ct. 710, 11 L.Ed.2d. 686 (1964); *Shelly v. Kraemer,* 334 US 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). "The test is not the form in which state power has been applied, but whether such power has in fact been exercised." *New York Times Co. v. Sullivan, supra,* 376 US at 265, 84 S.Ct. at 718, 11 L.Ed.2d at ____. In the instant case, the highest court in the State of Alabama has, in essence, held that Appellee was entitled to discriminate against Appellant on the basis of her sex. In so doing, the State

of Alabama has created a classification which is impermissible under the principle of Equal Protection of the Law.

Equal Protection seeks to guarantee the uniform treatment of persons standing in the same relation to the governmental action challenged or questioned. *Reynolds v. Sims,* 377 US 533, 84 S.Ct. 1362, 12 L.Ed.2d. 506 (1964). In the instant case, Appellant has been denied the benefit of such guarantee, as the holding of the Alabama Supreme Court has distinguished her, and others like her, from other females employed throughout the State. As the law of Alabama now stands, women working for employers with fifteen (15) or more employees are entitled to claim the protection of 42 USC § 2000e-2(a), while Appellant and others similarly situated are not so entitled. *See* 42 USC § 2000e(b); *EEOC v. Pettegrove Truck Service, Inc.,* 716 F.Supp. 1433 (S.D. Fla 1989); *Hishon v. King & Spaulding,* 678 F.2d 1022 (11th Cir. 1982); *Fike v. Gold Kist, Inc.,* 514 F.Supp. 722 (N.D. Ala. 1981); and *Burke v. Friedman,* 556 F.2d 867 (7th Cir. 1977) for the proposition that the protection of 42 USC § 2000e *et seq.* are expressly limited in their terms to include only employers having fifteen (15) or more employees.

In determining that a classification based on sex is permissible under the Equal Protection Clause, it must be found that such classification is substantially related to important governmental objectives. *Manufacturer's Hanover Trust Co. v. U.S.,* 775 F.2d 459 (2nd Cir. 1985); *Seoane v. Ortho Pharmaceuticals, Inc.,* 660 F.2d 146 (5th Cir. 1981); *Kirchberg v. Feenstra,* 450 US 455, 101 S.Ct. 1195, 67 L.Ed.2d. 428 (1981); *Orr v. Orr,* 440 US 268, 99 S.Ct. 1102, 59 L.Ed.2d. 306 (1979); *Califano v.*

*Webster,* 430 US 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Craig v. Boren,* 429 US 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). In the case below, the Alabama Supreme Court held that Appellee had an absolute right to terminate Appellant's employment, for whatever reasons it chose to offer. In so doing, the court created a classification of women who may be denied their Civil Rights because their employer has hired fewer than fifteen (15) persons. The logical question presented by the instant situation is: what important governmental objectives can possibly be furthered by allowing an employer to discriminate against its employees on the basis of sex? From the outset, it appears that the classification created by the Alabama court's ruling is arbitrary, and should be reversed.

Alabama should no longer be a safe harbor for companies and individuals who desire to promulgate discrimination on the basis of race, religion, national origin, or sex. The citizens of Alabama deserve to have employment opportunities with reputable and moral businesses. In making its ruling of November 25, 1992, the Alabama Supreme Court has refused to take a stand and pronounce that businesses that intend to discriminate on the basis of race, religion, national origin, or sex need not darken the doors of Alabama. In fact, the court's opinion has enabled small employers in Alabama to continue to discriminate against their employees, so long as they are hired "at-will." Appellee, and other employers in the State of Alabama, should not be able to discriminate against their employees because they do not fit the statutory definition of "employer" found at 42 USC § 2000e(b), and thus, do not have to abide by Federal Civil Rights Laws. The use of the employment at-will

doctrine to escape liability for such wrongful terminations as has been experienced by Appellant should not be encouraged or permitted by the State of Alabama, or by the Supreme Court of the United States.

Respectfully submitted,

THE TIPLER LAW OFFICES
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by: Frank J. Tipler, Jr.
Attorney of Record

# APPENDIX A

IN THE CIRCUIT COURT OF CONECUH COUNTY, ALABAMA

PATRICIA WILLIAMS HOWARD,
Plaintiff,

vs. CASE NO. CV-89-099

WOLFF BROADCASTING COMPANY, et. al.,
Defendants.

## ORDER GRANTING SUMMARY JUDGMENT

The defendant, WOLFF BROADCASTING COMPANY, has filed a Motion for Summary Judgment, and the Court has considered same.

It is the opinion of the Court that the claim of the Plaintiff, in Count II, for breach of an employment contract is subject to the rule of construction which makes the contract described by the pleadings and evidence in support of the Motion for Summary Judgment an "at will" employment contract. The Court has considered the argument of the Plaintiff that a sign stating that there would be no discrimination based upon race, color or gender, was observed by the Plaintiff during her hiring and employment, and this Court is of the opinion that, at most, this sign was a general statement of company policy and was not specific enough to rise to the level of a contract obligation.

The claim of the Plaintiff in Count I, for promissory fraud, was unsupported by any substantial

evidence of an intention to defraud at the time the parties entered into the contract of employment. Summary judgment is appropriate regarding that cause of action. In addition, the decision of the Court regarding the employment contract, i.e. that it was an "at will" contract, means that the Plaintiff could be fired for a good reason, a bad reason, or no reason at all, and thus could not show damage if there were fraudulent intent.

The Plaintiff also urged this Court allow the action to proceed under "public policy" exception to the employment at will doctrine. This Court is unable to do so, having considered the numerous precedents established by the Supreme Court of Alabama disallowing a "public policy" exception to the "at will" doctrine, and having determined that any change in the substantive law of the state must come from the legislature.

It is therefore ORDERED that said motion be and hereby is GRANTED as to Counts I and II of the Complaint.

Done at Evergreen, Alabama, this the 1st day of September, 1991.

Sam Welch
Circuit Judge

APPENDIX B

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

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1910603

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Patricia Williams Howard

v.

Wolff Broadcasting Corporation

Appeal from Conecuh Circuit Court

(CV-89-099)

MADDOX, JUSTICE.

The Plaintiff was fired by Wolff Broadcasting Corporation ("Wolff") solely because she was a female. The principal question presented here is whether this Court should carve out an exception to the employee-at-will doctrine and hold that plaintiff stated a cause of action for breach of an implied contract of employment, and for fraud.

The basic facts are not significantly disputed. In September or October 1987, the plaintiff, Patricia Williams Howard, inquired about employment with Wolff,

which operated a radio station. She was unemployed at that time. Shortly thereafter, Keith Holcombe, the manager of the station, called her and set up an interview. Wolff hired Howard as a disc jockey and advertising salesperson. Howard had no prior experience of any kind in the radio business. Howard presented evidence that, during the process of her hiring, she noted in the lobby of the station a sign stating that Wolff would not discriminate against "females, blacks, or any others". There was no written contract of employment.

On January 26, 1988, while Howard was on the air, Keith Holcombe drove to the station and informed her that she was fired. When he fired her, Holcombe told her that she was being fired because Karen Wolff, whose husband owned Wolff, did not want any females on the air. On that same night, Howard typed a letter stating that she was fired because Karen Wolff did not want females on the air. Howard says this letter was signed by Keith Holcombe.

On October 2, 1989, Howard filed a complaint against Wolff, alleging fraud and breach of contract, and against Karen Wolff, alleging intentional interference with business relations.[1]

After discovery was conducted, Wolff moved for a summary judgment, on the ground that Howard had failed, as a matter of law, to establish that she was

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[1]. When Wolff fired Howard, it had only seven employees, therefore, the Equal Employment Opportunity Commission did not have jurisdiction over Howard's complaint of discrimination. Likewise, Howard had no cause of action under federal law. See 42 U.S.C. § 2000(e)(2) (1972).

entitled to any relief. On September 1, 1991, after a hearing on Wolff's motion for summary judgment, the trial judge entered a judgment in favor of Wolff.[2] The court entered an order making the judgment final as to all parties on November 12, 1991. Howard appeals from Wolff's summary judgment on the claims of breach of contract and fraud.

Rule 56, A.R.Civ.P., sets forth a two-tiered standard for entering summary judgment. The rule requires the trial court to determine (1) that there is no genuine issue of material fact and (2) that the moving party is entitled to a judgment as a matter of law. The burdens placed on the moving party by this rule have often been discussed by this Court:

> "'The burden is on one moving for summary judgment to demonstrate that no genuine issue of material fact is left for consideration by the jury. The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing that there is no such issue of material fact. *Woodham v. Nationwide Life Ins. Co.*, 349 So.2d 1110 (Ala. 1977); *Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co.*, 390 So.2d 601 (Ala. 1980); *Fulton v. Advertiser Co.*, 388 So.2d 533 (Ala. 1980).'"

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[2]. Howard entered into a pro tanto release and settlement agreement with the defendant Karen Wolff, on October 9, 1991, on her claim alleging interference with a business relation.

*Berner v. Caldwell,* 543 So.2d 686, 688 (Ala. 1989) (quoting *Schoen v. Gulledge,* 481 So.2d 1094 (Ala. 1985)).

The standard of review applicable to a summary judgment is the same as the standard for granting the motion, that is, we must determine whether there was a genuine issue of material fact and, if not, whether the movant was entitled to a judgment as a matter of law. Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and resolve all reasonable doubts against the movant. *Wilson v. Brown,* 496 So.2d 756, 758 (Ala. 1986); *Harrell v. Reynolds Metals Co.,* 495 So.2d 1381 (Ala. 1986). See also *Hanners v. Balfour Guthrie, Inc.,* 564 So.2d 412 (Ala. 1990).

Because this action was not pending on June 11, 1987, Ala. Code 1975, § 12-21-12 mandates that the nonmovant meet her burden by "substantial evidence". *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794, 797-98 (Ala. 1989). Under the substantial evidence test, the nonmovant must present "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved". *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870, 871 (Ala. 1989). More simply stated, "[a]n issue is genuine if reasonable persons could disagree". Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 481 (1982).

**I. Breach of Contract**

Howard first argues that the trial court erred in entering the summary judgment in favor of Wolff on the

claim alleging breach of contract. The determinative question on that issue is whether Howard's employment contract was terminable at will.

"Employees at will can terminate their employment, or can be terminated by their employer, at any time, with or without cause or justification". *Allied Supply Co. v. Brown,* 585 So.2d 33, 35 (Ala. 1991). "Although this doctrine has been criticized as harsh, it remains the law in Alabama." *Id.* If the employment is terminable at will, the employer may even act maliciously in terminating the employee. *Salter v. Alfa Insurance Co.,* 561 So.2d 1050, 1054 (Ala. 1990).

It is undisputed that Howard was not offered lifetime employment of employment of any definite duration. However, Howard argues that her employment was not terminable at will because, she says, she comes within the exception recognized in *Hoffman-La Roche, Inc. v. Campbell,* 512 So.2d 725 (Ala. 1986). Under *Hoffman-La Roche,* an employment contract is not terminable at will if three conditions are met:

> "(1) that there was a clear and unequivocal offer of lifetime employment or employment of a definite duration; (2) that the hiring agent had authority to bind the principal to a permanent employment contract, and; (3) that the employee provided substantial consideration for the contract separate from the services to be rendered."

512 So.2d at 728 (citations omitted).

Howard contends that when she entered into her contract with Wolff, there was an implied covenant that Wolff would not discriminate against her on the basis on race, gender, religion, or national origin. Howard argues

that this covenant is implied in every contract of employment that is governed by the regulations of the Federal Communications Commission ("FCC"), the relevant provisions of which state:

> "Equal employment opportunities - (a) General EEO policy. Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin or sex.
>
> (b) EEO program. Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure opportunity in every aspect of station employment policy and practice. Under the terms of its programs, a station shall:
>
> (1) Define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;
>
> (2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation.

> (3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis;
>
> (4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based on race, color, religion, national origin or sex from its personnel policies and practices and working conditions; and
>
> . . . .
>
> (c)(1) Disseminate its equal opportunity program to job applicants and employees. For example, this requirement may be met by:
>
> . . . .
>
> (i) Posting notices in the station's office and other places of employment, informing employees and applicants for employment of their equal opportunity rights."

47 C.F.R. § 73.2080.

This Court has held that employment policies, especially those in writing, can "become a binding promise once it is accepted by the employee through his continuing to work when he is not required to do so". 512 So.2d at 733. In *Hoffman-La Roche,* certain employment policies were contained in an employee handbook. The Court held that the provisions contained in the employee handbook, when combined with the employee's continuation of employment following the

employee's receipt of the handbook, created a unilateral contract modifying the "at will" employment relationship. The Court stated:

> "[L]anguage contained in a handbook can be sufficient to constitute an offer to create a binding unilateral contract. The existence of such a contract is determined by applying the following analysis to the facts of each case: First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by the issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by retaining employment after he has become generally aware of the offer. His actual performance supplies the necessary consideration."

512 So.2d at 735.

It has long been the law in Alabama that employment is terminable at will by either party for any reason unless there is an express and specific contract for lifetime employment or employment for a specific duration. "[A]bsent an agreement on a definite term, any employment is considered to be 'at-will', and may be terminated by either party, with or without cause or justification." *Clark v. America's First Credit Union,* 585 So.2d 1367, 1369 (Ala. 1991). Furthermore, employees in Alabama bear a heavy burden of proof to establish that an employment relationship is other than "at will". The law considers lifetime or permanent employment contracts to be extraordinary and not lightly to be

implied. *Alabama Mills, Inc. v. Smith,* 237 Ala. 296, 301, 186 So. 699, 704 (1939).

In view of the principle that "absent an agreement on a definite term, any employment is considered to be 'at-will', and may be terminated by either party, with or without cause or justification", we cannot say that the provisions of 47 C.F.R. § 73.2080 could become "a binding promise once [they were] accepted by [Howard] through [her] continuing to work". *Hoffman-La Roche,* 512 So.2d at 733. In short, we cannot hold that the provisions of this federal regulation transformed Howard's at-will employment relationship with Wolff into a permanent one.

**II. Fraud**

Howard next argues that the summary judgment was also improper as to her fraud claim. Howard alleged in her complaint that Wolff, through a sign posted in the station lobby, "expressly represented to Plaintiff when hiring her that she would not be discriminated against on the basis of sex". (R. 15, 7). Howard alleged that the representation was false and was known by Wolff to be false when it was made.

Howard has not produced substantial evidence to support her claim that the alleged representation by Wolff misrepresented any material existing facts. Thus, Howard's complaint simply alleges, at best, promissory fraud. That is, Howard's complaint simply alleges that Wolff's alleged representation concerning its <u>future conduct</u> was false.

To establish a cause of action for promissory fraud, the plaintiff must prove: (1) that the defendant made a false representation of a material fact; (2) that the false representation was relied upon by the plaintiff;

(3) that the plaintiff was damaged as a proximate result of the reliance; (4) that the representation must have been made with a present intent to deceive; and (5) that when the representation was made the defendant intended not to perform in accordance with it. *Leisure American Resorts, Inc. v. Knutilla,* 547 So.2d 424, 426 (Ala. 1986). Thus, to establish a cause of action for promissory fraud, Howard must prove each element of a cause of action for fraud and also that, at the time the representation was made to Howard, Wolff had a present intent to deceive her. *Valley Properties, Inc. v. Strahan,* 565 So.2d 571 (Ala. 1990).

In *Hanners v. Balfour Guthrie, Inc.,* 564 So.2d 412 (Ala. 1990), the Court was presented with an issue of promissory fraud. In *Hanners,* the plaintiff, a peanut processor/seller, alleged that the defendant, a commodities dealer, had failed to pay for its peanut purchases within the time stated in their contract. The plaintiff alleged that the defendant had opened its account with the plaintiff with a present intent not to honor its contract obligation regarding time for payment and with the intent of deceiving the plaintiff. The Court stated:

> "'The only basis upon which one may recover for fraud, where the alleged fraud is predicted on a promise to perform or abstain from some act in the future . . . is when the evidence shows that, at the time . . . the promises of future action or abstention were made, the promisor had no intention of carrying out the promises, but rather had a present intent to deceive. If such intent is not substantiated by the

> evidence, the fraud claim should not be submitted to the jury. The failure to perform, alone, is not evidence of intent not to perform at the time the promise was made. It if were, a mere breach of contract would be tantamount to fraud.'"

*Hanners,* 564 So.2d at 414 (citations omitted) (quoting *Hearing Systems, Inc. v. Chandler,* 512 So. 2d 84, 87 (Ala. 1987)).

Howard produced no substantial evidence that Wolff made the alleged representation with a present intent to deceive Howard or with any intent not to perform the obligation at the time the alleged representation was made. Howard admitted that no one at Wolff ever told her anything or made any representation about any policy concerning equal employment or discrimination. Instead, Howard argues that the signing the station lobby stating the general policy that the station was an "equal opportunity employer" constituted a false representation under the law of this State and thus embodied a present intent to deceive. However, Howard never asked anyone at Wolff about the sign or about any related policy of the station. The summary judgment was properly entered in favor of Wolff on Howard's claim of promissory fraud.

**III. Public Policy**

Finally, Howard argues that, even assuming that a unilateral contract did not exist and that the "at-will" doctrine applies, there should be a public policy exception to that doctrine in this case.

The employment "at-will" doctrine was first recognized in Alabama in *Howard v. East Tennessee, v. & G. Ry.,* 91 Ala. 268, 8 So. 868 (1891). This doctrine

provides "that an employment contract terminable at the will of either the employer of the employee may be terminated by either party at any time with or without cause." *Grant v. Butler,* 590 So.2d 254 (Ala. 1991). Howard argues that because the doctrine is a judicially created one, the judiciary can and should abolish or modify it.

However, this Court has so far declined to judicially create a public policy exception to the employment "at-will" doctrine. *See Grant v. Butler,* 590 So.2d 254 (Ala. 1991); *Salter v. Alfa Insurance Co.,* 561 So.2d 1050 (Ala. 1990); *Bosarge v. Bankers Life Co.,* 541 So.2d 499 (Ala. 1989); and *Hinrichs v. Tranquilaire Hospital,* 352 So.2d 1130 (Ala. 1977). On the other hand, this Court has consistently chosen to apply the doctrine and to leave the creation of exceptions to the legislature. *See, e.g., Meeks v. Opp Cotton Mills, Inc.,* 459 So.2d 814 (Ala. 1984) (Court refused to create an exception for employees terminated as a result of filing claims for worker's compensation benefits); and *Bender Ship Repair, Inc. v. Stevens,* 379 So.2d 594 (Ala. 1980) (Court refused to create an exception for employees discharged for performing jury duty). When this Court refused to create an exception in *Meeks,* the legislature created a limited statutory exception permitting an employee terminated solely because he or she has made a claim for worker's compensation benefits to file an action for damages. Ala. Code 1975, § 25-5-11.1. Likewise, *Bender* has also been effectively overruled by the legislature's adoption of a statute preventing dismissal of an employee because the employee answered a call for jury service. Ala. Code 1975, § 12-16-8.1.

The Court has consistently refused to create a

cause of action for wrongful discharge on "public policy" grounds, for three reasons: (1) to do so would abrogate the inherent right of contract between employer and employee; (2) to do so would be to overrule the well-established employment law; and (3) "contrary to public policy" is too vague or nebulous a standard to justify creation of a new tort. *Salter,* 561 So.2d at 1052. (Quoting *Hinrichs v. Tranquilaire Hospital,* 352 So.2d 1130, 1131-32 (Ala. 1977).)

Howard urges the Court to adopt a narrow public policy exception to the employment "at-will" doctrine based on principles of non-discrimination. Indeed, many States have carved out exceptions to the employment "at-will" doctrine. *See, e.g., Sterling Drug, Inc. v. Oxford,* 294 Ark. 239, 743 S.W.2d 380 (1988); *Wheeler v. Caterpillar Tractor Co.,* 108 Ill.2d 502, 92 Ill.Dec. 561, 485 N.E.2d 372 (1985); *Parnar v. Americana Hotels, Inc.,* 65 Haw. 370, 652 P.2d 625 (1982); *Nees v. Hocks,* 272 Or. 210, 536 P.2d 512 (1975); and *Geary v. United States Steel Corp.,* 456 Pa. 171, 319 A.2d 174 (1974). Howard, in her brief, recognizes that this Court "has so far refused to allow a public policy exception to the employment 'at will' doctrine," but she says that "it is clear that the national trend exists for the adoption of a public policy exception to the employment 'at will' doctrine in the State of Alabama." Howard cites the special concurrence in *Salter v. Alfa Ins. Co.,* 561 So.2d 1050, 1055 (Ala. 1990), in support of her argument that the termination here strikes at the very heart of her argument that the termination here strikes at the very heart of her personal right not to be discriminated against. In *Hinrichs v. Tranquilaire,* 352 So.2d 1130, 1131-32 (Ala. 1977), this Court was asked, but it refused, to create a public policy

exception and to recognize a cause of action for damages for wrongful termination in a case in which the employee was discharged because she would not falsify certain medical records. Three Justices dissented in that case, but it has not been overruled.

On the public policy issue, the Congress of the United States has elected to exempt Wolff from the provisions of law relating to discrimination in employment. While we recognize that under the provision of 47 C.F.R. § 73.2080, Wolff is prohibited from discriminating on the basis of sex, we do not think, especially in view of the principle stated in *Hinrichs,* that we should judicially create a wrongful discharge action based on "public policy" grounds in this case involving a licensee of the FCC. In refusing to adopt a "public policy" exception, we should not be understood as condoning a person's discharge because of gender. We merely hold that it is the province of the legislature to create such an exception, if it should determine that employees such as Howard, who cannot come within the provisions of the Equal Employment Act, should be given the right to sue for damages.

The legislature, when it meets, may desire to create a cause of action in circumstances such as those presented here. The legislature effectively overruled *Meeks v. Opp Cotton Mills* and *Bender Ship Repair, Inc. v. Stevens* when it provided in §§ 25-5-11.1 and 12-16-8.1, respectively, for a remedy under limited circumstances. In short, the legislature has shown its willingness and ability to respond to perceived injustices that can result by a strict application of the long-standing doctrine of employment "at-will." Thus, we again decline to modify the employee-at-will doctrine by creating a

public policy exception and defer to the judgment of the legislature.

For the foregoing reasons, judgment of the trial court is affirmed.

**AFFIRMED.**

Houston, Steagall, Kennedy, and Ingram, JJ., concur.

No. 92-1407

In The

# Supreme Court of the United States

October Term, 1992

PATRICIA WILLIAMS HOWARD,

*Petitioner,*

v.

WOLFF BROADCASTING CORPORATION,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court of Alabama**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether an equal protection claim was presented in the courts below?

2. Whether there is state action?

3. Whether Alabama's "at will" doctrine violates the Equal Protection Clause of the Fourteenth Amendment?

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No. 92-1407

In The

# Supreme Court of the United States

October Term, 1992

PATRICIA WILLIAMS HOWARD,

*Petitioner,*

v.

WOLFF BROADCASTING CORPORATION,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court of Alabama**

## RESPONDENT'S BRIEF IN OPPOSITION

## STATEMENT OF JURISDICTION

Respondent respectfully submits that this Honorable Court is without jurisdiction to review the decision of the Supreme Court of Alabama in this case, rendered November 25, 1992, because no federal question or claim was presented by petitioner in the courts below and the Alabama Supreme Court did not decide any federal question.

## STATEMENT OF THE CASE

Petitioner's statement of the case is factually incomplete and inadequate in the discussion of the claims and proceedings in the courts below.

Petitioner was unemployed when she was hired by Wolff Broadcasting Corporation in October of 1987, and her employment with respondent was terminated in January of 1988.[1] Petitioner asserts that she "lost her job solely because she is female." (Pet. 3). Although the Alabama Supreme Court assumed for purposes of reviewing a summary judgment that petitioner was fired because she was a female, the actual reason for petitioner's termination is a disputed question of fact.

Respondent's motion for summary judgment was based *inter alia* on the affidavit testimony of Peter Wolff, the president of Wolff Broadcasting Corporation:

> Patricia Williams Howard had both in person and via telephone requested money from Pete Wolff. Patricia Williams Howard made certain sexual advances to Pete Wolff allegedly in exchange for his assistance, financial or otherwise. Patricia Williams Howard then threatened to go on the air at the radio station and accuse Pete Wolff of being a homosexual, because Pete Wolff refused her advances. Pete Wolff felt this amounted to attempted extortion and then

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[1] Respondent, Wolff Broadcasting Corporation, is an Alabama corporation solely owned by Peter Wolff. There are no parent or subsidiary companies.

> called Keith Holcombe and told him to get Patricia Howard off the air.

(R. 56, 129).

Petitioner alleged that on the night her employment was terminated, the station manager, Mr. Holcombe, told her that the owner's wife did not want any females on the air: "When he fired her, Mr. Holcombe told her that she was being fired because Karen Wolff, the owner's wife, did not want any females on the air" (P. 3 of the brief of Patricia Williams Howard, Appellant, in the Supreme Court of Alabama). Petitioner's version is disputed. Karen Wolff filed an affidavit in which she testified, "I do not have any personal knowledge as to why Patricia Howard was terminated from Wolff Broadcasting as I had nothing to do with her termination." (R. 127). The station manager filed an affidavit wherein he testified, "Karen Wolff, one of the Defendants in this case, did not interfere with Ms. Howard's employment at Wolff Broadcasting nor did she have anything to do with Ms. Howard's termination." (R 128).

The reason for petitioner's termination was vigorously contested in both the trial court and the Supreme Court of Alabama. In her brief to the Supreme Court of Alabama, petitioner asked the court to conclude (assume), for purposes of reviewing the summary judgment, that she was terminated because she was a female: "Because of the posture of this case, the Court must conclude, for purposes of this appeal, that Howard was fired solely because she was female." (Appellant's Reply brief, p. 3). Petitioner further argued that she had "presented evidence to the trial court which created a genuine

*issue* of material fact" as to the reason for her termination. *Id.*

Respondent is aware that the Opinion of the Alabama Supreme Court contains the erroneous statement that petitioner was terminated solely because she was a female. Respondent did not move for rehearing of the November 25, 1992, Opinion because respondent had prevailed and because, when reviewing the propriety of the summary judgment, it made no difference whether the reason for petitioner's termination was a disputed question of fact. The Alabama Supreme Court held, in effect, that it would not judicially create a new public policy exception to Alabama's traditional employment at will doctrine *even if* petitioner had been terminated because of gender.

It is undisputed that there was no written agreement defining the terms of petitioner's employment with respondent and no promise of permanent employment or any stated duration of employment. Petitioner's two claims against respondent were based on a sign she saw in the lobby on the day she applied for employment:

> Q. Tell me as best you can remember what the sign said.
>
> A. I don't remember really, just to do with discrimination. I'm not sure. I can't remember.
>
> Q. You can't remember what it said?
>
> A. Not exactly, no.
>
> Q. Did you have an understanding of what it said when you were hired at Wolff Broadcasting?

> A. Well, it was there where you could see it; I guess so.
>
> Q. Tell me what your understanding of what it said as you remember it today was.
>
> A. That you wouldn't be fired, I guess, if you were a female, black or any other, you know.

(R. 148-149).

It is undisputed that petitioner did not file a claim with the EEOC alleging sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), nor did petitioner file any complaint in any state or federal court stating a claim under that statute. It is undisputed that petitioner did not file any complaint with the Federal Communications Commission nor institute any proceeding challenging the license of respondent based on alleged violation of the FCC Equal Employment Opportunity Regulation, 47 C.F.R. § 73.2080(c)(i). In effect, petitioner failed to comply with any of the administrative procedures which might be a prerequisite to bringing a discrimination claim in court, and petitioner failed to file any claim in any court alleging violation of the Civil Rights Act or of any provision of the Constitution of the United States or of the State of Alabama.

One year and ten months after her termination, petitioner filed a complaint in state court alleging two counts against respondent: Count I, Alabama common law fraud; Count II, breach of contract. Respondent moved for summary judgment and argued *inter alia* that, under established Alabama law, petitioner's claims were barred

by Alabama's common law "at will" employment doctrine, that petitioner's claims did not come within any recognized exception to the employment "at will" doctrine in Alabama, and that certain evidentiary deficiencies existed in petitioner's claims. After consideration of the briefs, arguments, and materials submitted by respondent and petitioner, the trial court granted respondent's motion. The trial court concluded that petitioner's employment was "at will." The trial court declined to create a "public policy" exception to the at will doctrine, "having considered the numerous precedents established by the Supreme Court of Alabama disallowing a 'public policy' exception to the 'at will' doctrine, and having determined that any change in the substantive law of the state must come from the legislature." (Pet. App. 2a). The trial court also concluded that petitioner's fraud claim failed to meet the evidentiary requirements of Alabama law. The order granting summary judgment did not address any claim under the Civil Rights Act nor any claim that petitioner's right to equal protection of the law had been violated or would be violated by Alabama's at will doctrine, because no such claims or issues had been presented to the trial court.

On appeal to the Supreme Court of Alabama, petitioner argued that her breach of contract claim came within a recognized exception to Alabama's "at will" employment doctrine,[2] and that the Alabama court should create a new "public policy" exception to the at

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[2] Petitioner argued that her breach of contract claim came within the exception recognized in *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725 (Ala. 1987).

will doctrine, and that petitioner's fraud claim met the requirements of Alabama law. Petitioner never advanced the argument that Alabama's "at will" doctrine, either in general or as applied in this case, violates equal protection of the law under the Constitution of the United States or the State of Alabama. Thus, petitioner failed to raise *any* constitutional question or issue in either the trial court or in the Supreme Court of Alabama.

The Opinion of the Supreme Court of Alabama did not condone or approve gender-based discrimination in employment. The Supreme Court of Alabama held that petitioner's employment was terminable "at will" and, under Alabama's long standing "at will" doctrine, such employment may be terminated by the employer or employee at any time with or without cause or justification. The court upheld the summary judgment on petitioner's fraud claim because petitioner failed to meet the Alabama evidentiary requirements of a claim of promissory fraud. Finally, the court declined to judicially create a "public policy" exception to the "at will" employment doctrine:

> In refusing to adopt a 'public policy' exception, we should not be understood as condoning a person's discharge because of gender. We merely hold that it is the province of the legislature to create such an exception, if it should determine that employees such as Howard, who cannot come within the provisions of the Equal Employment Act, should be given the right to sue for damages.

(Pet. App. 14b).

## SUMMARY OF ARGUMENT

No federal question was presented in the courts below. The first time petitioner asserted any violation of her right to equal protection of the law was in her petition to this Court. Review should be denied due to petitioner's failure to raise in the courts below *any* claims or issues under the Constitution of the United States. Additionally, there would be no reason for review even if petitioner had presented her equal protection argument in the Alabama courts because Alabama's common law employment "at will" doctrine does not violate equal protection of law.

## REASONS FOR DENYING THE WRIT

### I. THIS COURT SHOULD NOT GRANT REVIEW TO DECIDE QUESTIONS NOT PRESENTED IN THE COURTS BELOW

Petitioner apparently contends that the Supreme Court of Alabama deprived her of equal protection of the law in its Opinion upholding the summary judgment entered by the trial court. Petitioner contends that Alabama's employment "at will" doctrine and the refusal of the trial court and the Supreme Court of Alabama to judicially create a "public policy" exception to that doctrine somehow deprived petitioner of equal protection of the law. Review is due to be denied because petitioner never presented a claim in the courts below that either her termination or the "at will" doctrine, in general or as applied to her case, violate equal protection; and that claim was never passed upon below.

When opposing respondent's motion for summary judgment in the trial court, petitioner never argued that her termination or the "at will" doctrine violated equal protection. Petitioner never argued on appeal, in either her initial appellant's brief or her reply brief, that her termination or the "at will" doctrine violated equal protection. Petitioner never even used the words "equal protection" nor cited or referred to the Fourteenth Amendment. Petitioner never cited any cases or authorities for the proposition that the Fourteenth Amendment was implicated in this case or would be violated if the court did not create a "public policy" exception to the "at will" doctrine as requested by petitioner. Petitioner never argued that *any* provision of the Constitution of the United States or the State of Alabama had been violated. Petitioner did not even move for rehearing of the November 25, 1992, Opinion of the Supreme Court of Alabama and then attempt to present any such issue. Under these circumstances, where petitioner's equal protection argument was *never* presented or passed upon in the courts of Alabama, this Court is without jurisdiction in this case.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In *Cardinale* the Court reviewed the reasons for declining to grant certiorari in such cases:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC § 1257, there are sound reasons for this. Questions not raised below are those on which the

> record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the application of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them.

*Id.* at 439.

The Court has consistently declined to review federal questions, even constitutional issues, where the question was neither raised nor passed upon in the state court. *Michael H. v. Gerald D.*, 491 U.S. 110, 116-117 (1989)("We do not reach Michael's equal protection claim, however, as it was neither raised nor passed upon below."); *Bankers Life & Casualty Company v. Crenshaw*, 486 U.S. 71 (1988) ("We conclude, however, that these claims were not raised and passed upon in state court, and we decline to reach them here."); *Heath v. Alabama*, 474 U.S. 82 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-222 (1983); *Webb v. Webb*, 451 U.S. 493 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

In *Webb v. Webb*, the Court concluded that it was without jurisdiction to review the petitioner's federal question where the petitioner failed to rely upon the

Federal Constitution in the state court and where the state appellate court did not pass upon any federal question. The Court declined review even though petitioner used the phrase "full faith and credit" in the state court proceedings: "Although petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution." 451 U.S. at 496. Petitioner Howard never even used the words "equal protection" at any point in the proceedings in the state courts of Alabama!

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 496-497. The Court re-emphasized in *Webb* the reasons for adhering to this rule:

> It is appropriate to emphasize again, *see Cardinale v. Louisiana, supra,* at 439, 22 L Ed 2d 398, 89 S Ct 1161, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. . . .

. . .

There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to

> the case. In terms of our own workload, this is a very substantial matter.

*Id.* at 499-501.

The Court concluded that, at a minimum, "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* at 501. These minimal requirements to review by this Court clearly are not satisfied in this case. Petitioner did not claim any violation of equal protection, under either the Federal Constitution or the Alabama Constitution, in the Alabama courts.

There is no ruling in either the order granting summary judgment by the trial court (Pet. App. 1a) or in the Opinion of the Supreme Court of Alabama (Pet. App. 1b) on any question of equal protection or any other constitutional question. The absence of any ruling on petitioner's federal question is evidence that no such question was presented in the state courts: "This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Id.* at 495.

This case is a perfect example of one of the practical reasons why the Court declines review of issues not presented in the state courts. Petitioner failed to assert in the Alabama courts that Alabama's common law "at will" doctrine, either in general or as applied in this case,

violates equal protection of the law. Petitioner now contends the "at will" doctrine encourages gender-based discrimination, but there is absolutely no evidence in the record that the "at will" doctrine was created to promote gender-based discrimination or that the doctrine has had that impact. Petitioner has offered no historical or statistical data to support her equal protection claim. It is likely, even probable, that more males than females have been discharged by Alabama employers without any good reason or for an improper reason, and there is absolutely no evidence in the record that the "at will" doctrine has had any disparate effect upon female employment in Alabama. In other words, the record is undeveloped on the question of whether the "at will" doctrine was created for the purpose of encouraging gender-based discrimination or that it has had that effect.

Petitioner Howard has not met her burden of demonstrating that she presented her equal protection question in the state courts and that it was passed upon by the highest court of the State of Alabama. To the contrary, petitioner did not raise any equal protection question in her pleadings in the trial court, in her opposition to the respondent's motion for summary judgment, in her appellate briefs to the Supreme Court of Alabama, or any application for rehearing of the Opinion of the Supreme Court of Alabama. Petitioner's equal protection question appears, for the first time, in her petition to this Court. Under these circumstances, this Court is without jurisdiction in this case and, under the longstanding rule of this Court and the policy considerations reviewed above, the Court should deny the petition.

## II. THERE IS NO STATE ACTION

It is axiomatic that the Fourteenth Amendment protects only against deprivations of Constitutional rights by the state, not by private conduct, however wrongful or discriminatory. "As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'" *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). Petitioner's employment with respondent was terminated by respondent, a privately owned corporation, without any state involvement. Even assuming *arguendo* respondent's employment was terminated for reasons of gender, the Fourteenth Amendment would not protect petitioner from such private conduct because respondent's actions are not fairly attributable to the state.

"The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). Respondent is a licensed broadcast station, but this does not convert respondent's conduct into state action. "Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government." *San Francisco Arts and Athletics, Inc. v. U.S.O.C.*, 483 U.S. 522, 544 (1987). "Most fundamentally, this Court has held that a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *Id.* at 546.

Petitioner cites several cases for the proposition that judicial action in private disputes can be a form of state action. (Pet. 11). Each of the cases cited involves unique circumstances and claims not present in this case; and none of the cases cited supports petitioner's proposition that the absence of a common law remedy providing a private right of action for damages against a private employer for alleged gender-based employment discrimination constitutes state action subject to the scrutiny of the Equal Protection Clause of the Fourteenth Amendment.

"Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982). And the Alabama Supreme Court did not adopt, encourage, or approve any discriminatory employment practice: "In refusing to adopt a 'public policy' exception, we should not be understood as condoning a person's discharge because of gender." (Pet. App. 14b).

The Alabama court did not approve nor encourage any discriminatory practice; rather, the court simply declined to create a new common law action for wrongful termination based upon concepts of "public policy" – which would also require deciding questions of procedures, limitations, damages, etc., best left to the legislative branch of government. For example, Congress placed various procedural requirements and limitations on actions to redress violations of rights created by Title VII of the Civil Rights Act of 1964. "Under Title VII, cases of alleged employment discrimination are subject to a

detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims." *Great American Federal Savings & Loan Assoc. v. Novotny*, 442 U.S. 366, 372-373 (1979). Petitioner would apparently have the Alabama court create a new common law right to sue for damages for alleged discriminatory termination without the carefully worked out system of administrative procedures and limitations contained in Title VII. The Alabama court indicated its willingness to enforce any reasonable statutory scheme enacted by the state legislature which might provide some new right to sue for damages in termination cases. The court's refusal to *judicially* create a "public policy" exception to the "at will" doctrine and to create a new action for damages is not an exercise of "coercive power" sufficient to justify holding the state responsible for the actions of private employers.

The mere fact that the common law of Alabama does not provide any private remedy against a private employer where "at will" type of employment is terminated by the employer for an improper reason or motive (or for no reason at all, *e.g., caprice*) does not convert the decision of the private employer into state action. This case involves purely private conduct, neither participated in nor encouraged by the State of Alabama, and is not within the scope of the Equal Protection Clause of the Fourteenth Amendment.

## III. ALABAMA'S "AT WILL" DOCTRINE DOES NOT VIOLATE EQUAL PROTECTION

The "at will" doctrine merely provides that in private employment, where the parties have not agreed upon an express duration of employment nor expressly contracted for other limitations on termination, the employment relationship may be terminated with or without cause or justification by either party, even for an improper motive. The doctrine is equally applied to all persons and groups and has no discriminatory purpose.

The Supreme Court of Alabama has consistently declined to judicially create a "public policy" exception to the "at will" doctrine when presented with a wide variety of allegedly wrongful or "improper" terminations. The Alabama court has deferred to the legislative branch of government to enact restrictions, with all of the corresponding procedures, remedies, and limitations, on the right of private employment. Congress and the Alabama legislature have placed some statutory limitations on employment practices, including termination, but petitioner alleges that she does not fall within the protection of those statutes. Instead of challenging the constitutionality of the Civil Rights Statute, Title VII, as violative of equal protection, petitioner instead asserts that the failure of the Alabama courts to create a new common law remedy for persons not within the scope of Title VII somehow violates equal protection. Petitioner's argument ignores the distinctions between the judicial and legislative branches and is without support in the law. Petitioner is contending that a neutral common law doctrine, which is applied equally to all persons and all groups,

violates equal protection of the law. Petitioner's claim is without support in the record or in cases interpreting the Equal Protection Clause.

Even if it is assumed *arguendo* that petitioner had presented her equal protection claim in the state courts and that the conduct petitioner complains of could be attributable to the state, petitioner has failed to make a *prima facie* case under the Equal Protection Clause of the Fourteenth Amendment. The standard for determining whether conduct violates the Equal Protection Clause of the Fourteenth Amendment is not the same as that applied for adjudicating claims under Title VII. *Washington v. Davis*, 426 U.S. 229 (1976). The Equal Protection Clause is not violated merely because a state law or action results in a disproportionate impact on a protected group or class; rather, the law claimed to be discriminatory must ultimately be traced to a discriminatory purpose. *Id.*

*A claim based upon the Equal Protection Clause requires evidence of a discriminatory purpose*:

> Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race-neutrality.

*Hernandez v. New York*, 114 L.Ed.2d 395, 407 (1991).

The fact that a law or official practice adopted for a lawful purpose has a differential impact on women is not enough to sustain a claim under the Equal Protection Clause. The Court applied the "discriminatory purpose"

requirement to a sex discrimination claim made under the Equal Protection Clause in *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). The Court examined the discriminatory purpose requirement:

> 'Discriminatory purpose' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.

*Id.* at 279 (authority omitted).

There is nothing in the record of this case that would demonstrate that the "at will" doctrine was originally devised to accomplish the collateral goal of allowing or encouraging termination of employment for reasons of gender or that it was applied in this case for that purpose. To the contrary, the Alabama court declined to *judicially* create a new wrongful termination action in the area of private employment out of deference to the legislative branch of government, not because of any discriminatory purpose.

The respondent argued throughout its brief to the Supreme Court of Alabama that the court should not create a new common law action under a "public policy" exception to "at will" employment because perception and declaration of relevant public policy questions are better and more appropriately explored and resolved by the legislature. Respondent quoted from the opinion in *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. App. 1990) as follows:

> There are rights created under federal statutes which may be enforced by certain aggrieved at will employees without regard to the principles of state law. Although those at will employees may have no state remedy, they do have a viable remedy for the 'wrongful' termination of their employment. *The determination of whether these federal statutes are reflective of this state's 'public policy' and if so, whether they are sufficiently comprehensive as to obviate the necessity for creation of an additional state remedy are matters to be addressed by legislators who are the elected representatives of the public.*

(P. 30 of appellee's brief, emphasis added).

Respondent also quoted from the opinion in *Murphy v. American Home Products Corp.*, 448 N.E.2d 86, 89-90 (N.Y. App. 1983), as follows:

> The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. *If the rule of nonliability for termination of at will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.*

(P. 32 of appellee's brief, emphasis added).

In conclusion, there is no evidence of any "discriminatory purpose" on the part of the Supreme Court of Alabama in the creation of the "at will" doctrine or in its application in this case. Out of a proper deference to the legislative branch of government, the Alabama court reluctantly declined to create a new common law action for damages for alleged wrongful termination of private employment as an expression of "public policy."[3] The Alabama court applied the "at will" doctrine "in spite of" its possible adverse effect upon a group but not "because of" such adverse effects. There is no violation of the Equal Protection Clause of the Fourteenth Amendment in this case.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[3] A bill has been introduced in the Alabama Senate, S-474, which prohibits employment termination for reasons of gender. The bill has been approved by the Senate Judiciary – Civil Committee and sent to the Senate.

Supreme Court, U.S.
FILED
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No. 92-1407

In The

# Supreme Court of the United States

October Term, 1992

PATRICIA WILLIAMS HOWARD,

*Petitioner,*

v.

WOLFF BROADCASTING CORPORATION,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of Alabama**

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## QUESTIONS PRESENTED

1. Whether an Equal Protection claim was presented in the courts below?

2. Whether there is state action?

3. Whether Alabama's "at will" doctrine violates the Equal Protection Clause of the Fourteenth Amendment?

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## SUMMARY OF ARGUMENT

Throughout the course of the proceedings of her case in the Alabama courts, Petitioner repeatedly asserted that she was fired in violation of her rights, specifically her right not to be discriminated against regarding employment. In ruling adversely to her claims, the Alabama Supreme Court has enforced her former employer's discriminatory conduct and given other similarly situated employers a vehicle through which they may also discriminate against their employees. Petitioner's present claim that her right to Equal Protection of the Law was violated was implicitly, yet forcefully, presented to the Alabama courts at each stage of the proceedings below. The action taken by the Alabama Supreme Court in upholding the unfavorable ruling of the Circuit Court of Conecuh County was done in violation of her right to Equal Protection of the Law, as guaranteed her by the Fourteenth Amendment of the United States Constitution. Petitioner should not be denied an opportunity to present her claims to this Court.

## REASONS FOR GRANTING THE WRIT

### I. A FEDERAL QUESTION WAS ADEQUATELY PRESENTED IN THE COURTS BELOW.

Respondent argues that Petitioner failed to apprise the Alabama courts of the existence of a Federal Question in her case. In fact, the very essence of Petitioner's claims is a violation of rights secured to her under the doctrine of Equal Protection. Petitioner was unable to pursue a Federal remedy as such, since the body of law under which a similarly situated person would seek redress specifically exempts her from its coverage. *See* 42 USC

§ 2000e *et seq.*; Petitioner's Brief at 12. Therefore, Petitioner had no choice but to pursue her claims in the guise of Alabama common-law remedies.

This Court has recently urged that the "pressed or passed upon below" rule, upon which Respondent bases its arguments, is merely prudential in nature, and not jurisdictional. *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The *Illinois v. Gates* court noted that, on many occasions, this Court has heard arguments and made important decisions based on grounds which were not asserted in the state courts below, citing *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) and *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) as examples. In each of the above-cited cases, this Court noted that the parties did not raise the questions presented for review in the courts below, yet still granted certiorari. Moreover, this Court has heard arguments that were not raised below simply because an important constitutional question was raised by the case before it. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In the instant case, the more prudent holding would be to grant certiorari, as Petitioner's claims deal with the violation of an important right – that of being able to secure and maintain employment in a discrimination-free environment.

It was emphasized in Respondent's Opposition Brief that Petitioner did not specifically argue that her right to Equal Protection of the Law had been violated by the actions of her former employer, or that her right would be violated if the Alabama courts ruled adversely to her interests. *See* Respondent's Brief at 9, 11. However, this

Court has held that "[n]o particular form of words or phrases is essential [to assert a claim of invalidity], but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." *Street v. New York*, 394 U.S. 576, 584, 89 S.Ct. 1354, 1361-62, 22 L.Ed.2d 572, ___ (1969), citing *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184, ___ (1928). In the same case, this Court also stated that "if the record *as a whole* shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* (emphasis added). At each stage of the proceedings in the Alabama courts, Petitioner was clear in her assertion that she lost her job solely because she is female. Further, her assertion was recognized by the Supreme Court of Alabama, as it noted in the first line of its Opinion of November 25, 1992. *See* Pet. Brief at 1b. Certainly, the Alabama courts were apprised of the basic nature of her claims.

In its Opposition Brief, Respondent cited at length from *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). *See* Res. Brief at 11-13. Notably, Respondent cited that "there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim." Res. Brief at 13. However, Respondent failed to note that the *Webb* decision also stated that "[a]lthough it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity." *Webb v.*

*Webb*, 451 U.S. at 501, 101 S.Ct. at 1894, 68 L.Ed.2d at ___. At the state level, Respondent argued at length that Petitioner should have brought her claim under the auspices of 42 USC § 2000e *et seq*. In response, Petitioner argued that the aforementioned Federal remedy was not available to her for the purposes of recovery against her employer. Again, the issue in question was "pressed" with the Alabama Courts.

"[I]f the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel Bryant v. Zimmerman, supra*, at 278 U.S. 67, 49 S.Ct. 63, 73 L.Ed. ___. In upholding the Summary Judgment granted by the Circuit Court of Conecuh County, the Alabama Supreme Court has decidedly denied Petitioner's Claims. Therefore, the Alabama courts have effectively "passed" on Petitioner's claims as well. Therefore, this Court should grant Certiorari and hear Petitioner's claim sounding in Equal Protection.

A particularly persuasive case illustrating Petitioner's argument is *Jones National Bank v. Yates*, 240 U.S. 541, 36 S.Ct. 429, 60 L.Ed. 788 (1916). Although the above-cited case was decided many years ago, its logic is still irrefutable. In *Jones National Bank v. Yates*, the Federal issue sought to be decided by this Court was not raised in specific terms by the Petitioner at any time in the proceedings below. In fact, the Federal question was discussed exclusively by the Respondent in said action. Eventually, the state court held adversely to the Petitioner, and said Petitioner presented its Federal question to this Court for review. In granting certiorari, this Court held that "[t]he fact that their petitions did not refer, in terms, to the Federal statute is not controlling . . . The conclusion of the trial court that there could be a recovery

at common law, independent of the Federal statute, did not alter the inherent character of the action." *Id.* at 240 U.S. ___, 36 S.Ct. 433, 60 L.Ed. ___.

In the instant case, Petitioner did not specifically allege that the actions of her employer were violative of her right to Equal Protection of the Law, nor did she specifically allege that her right to Equal Protection of the Law would be violated if the Alabama courts denied her any recovery. However, Petitioner repeatedly stated that the impetus behind each of her claims was the implied promise that she would not be discriminated against because of her sex. Respondent also emphasized the gist of Petitioner's arguments to the Alabama courts, by insisting that she had raised a Federal issue, under 42 USC § 2000e *et seq*. Finally, the Alabama Supreme Court noted that Petitioner was the victim of sex discrimination by Respondent. A claim sounding in sex discrimination inherently alleges a violation of Equal Protection, as such actions invariably present a class of persons who are deprived of a certain right. It is obvious that the Alabama Supreme Court was sufficiently apprised of the nature of Petitioner's arguments, and that its November 25, 1992, decision denied her implicit claim of constitutional infirmity under Fourteenth Amendment Equal Protection analysis.

Petitioner also notes that her claim alleging a violation of Equal Protection did not arise until the Alabama Supreme Court announced its decision on November 25, 1992. By its express terms, the Fourteenth Amendment requires state action as a condition precedent to bringing an action for a violation of Equal Protection. In the instant case, the requisite state action is that of the Alabama

Supreme Court's ruling. Therefore, Petitioner's claim did not truly arise until that time.

## II. ACTS OF THE JUDICIARY ARE STATE ACTION.

Respondent also argues that the action taken by the Alabama Supreme Court which, in effect, gave employers in the state a license to discriminate against their at-will employees, is not "state action" as is required to sustain a Fourteenth Amendment claim. *See* Res. Brief at 15. In support of its argument, Respondent cites case law holding that a government can usually only be held responsible for a private decision when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government. *Id*, citing *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546, 107 S.Ct. 2971, ___, 97 L.Ed.2d 427, ___ (1987). Respondent also argues that heavy state regulation of business interest does not convert private acts into those of the state. *Id*, citing *Jackson v. Metropolitan Edison Co*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). Respondent has stated a correct interpretation of the law as it relates to the degree of government involvement necessary to attribute an individual's actions to the state. However, its argument relating to extensive regulation is flawed, as Petitioner's claim involves an action of the Alabama *judiciary* denying her right to Equal Protection.

"[A] state may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the [Fourteenth] Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies

or by another. " *Shelly v. Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161, ___ (1948), citing *Commonwealth of Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1800). The *Shelly v. Kraemer* Court also noted various instances in which the Court had previously ruled that actions of the judiciary are state action within the meaning of Fourteenth Amendment Equal Protection. *Id.* at 334 U.S. 15, 68 S.Ct. 843, 92 L.Ed. ___. Finally, the Court held that "when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Id.* at 334 U.S. 20, 68 S.Ct. 845, 92 L.Ed. ___.

Respondent attempts to distinguish Petitioner's authority regarding state action by stating that each of the cases cited by Petitioner are limited to their facts. However, Respondent cites no legal authority in which a judicial act was *not* deemed a state action. In fact, all of Respondent's authority involve situations of regulation by the state, not instances of judicial action. Conversely, each of Petitioner's cited cases involve situations in which the courts of different states upheld and enforced discriminatory and illegal acts of individuals. Moreover, the action by the Alabama Supreme Court which Petitioner claims denied her right to Equal Protection of the Law goes far beyond "mere approval or acquiescence in the initiatives of a private party," as Respondent was sure to warn against in its Opposition Brief. *See* Res. Brief at 16, citing *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In upholding the Summary Judgment of the Circuit Court of Conecuh County, the Alabama Supreme Court has granted its explicit approval of, and permission for, employment discrimination on the basis

of sex. This court cannot similarly enforce such conduct by employers.

## III. ALABAMA'S "AT WILL" DOCTRINE, AS APPLIED IN THIS CASE, VIOLATES EQUAL PROTECTION.

Respondent's final argument is that Petitioner has not made a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. In support of its argument, Petitioner cites case law holding that a claim based on the Equal Protection Clause requires evidence of a discriminatory purpose. *See* Res. Brief at 19-20. In fact, the Alabama Supreme Court's denial of Petitioner's claim was an intentional deprivation of her right to Equal Protection under the law. The discriminatory impact of its decision cannot be ignored by this Court. Thus, the Alabama Court's actions cannot be seen as anything other than intentional.

Respondent urges that the Alabama "at will" doctrine does not violate Equal Protection, and that it is neutral in its application to this case. *See* Res. Brief at 18. Respondent cites *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) for the proposition that a showing of "discriminatory purpose" requires more as intent than volition or awareness of consequences. *See* Res. Brief at 20. In the instant case, Petitioner repeatedly asserted that her right to not be discriminated against in her employment had been violated by the actions of her former employer. The Alabama courts were well aware of the implications of their various holdings. Additionally, the courts were given the opportunity to grant Petitioner an appropriate remedy by

adopting a public policy exception to the "at will" doctrine. It cannot be denied that the Alabama courts acted with a discriminatory purpose.

It is well-settled that discriminatory impact alone will not support a Fourteenth Amendment Equal Protection claim. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976). However, the inevitability of the effects to be wrought by an adverse decision by the Alabama court cannot be ignored in discerning its intent. Regarding the broad statements it made as to the level of proof necessary to establish the requisite intent to discriminate, the *Feeney* court noted that:

> [t]his is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the statute at issue], a strong inference that the adverse effects were desired can reasonably be drawn.

*Id.* at n. 25, 442 U.S. 279, 99 S.Ct. 2296, 60 L.Ed.2d ___. *See also Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1867, 114 L.Ed.2d 395, ___ (1991).

"Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870, ___ (1979), citing *Caban v. Mohammed*, 441 U.S. 380, 398, 99 S.Ct. 1760, 1771, 60 L.Ed.2d 297, ___ (Stewart, J., dissenting). Therefore, this Court should take all the surrounding circumstances into account in making its determination as to whether the Alabama Supreme Court possessed the requisite intent to discriminate against Petitioner in making its November 25, 1992 ruling.

## CONCLUSION

On November 25, 1992, the Alabama Supreme Court held that Respondent had a right to terminate Petitioner's employment solely because she is female. In its Opposition Brief, Respondent notes the fact that a bill prohibiting employment discrimination on the basis of sex has been proposed in the Alabama Senate. However, said legislation will not redress the deprivation of rights that Petitioner has already suffered. The opinion in question has sanctioned discrimination by private employers, and said employers will continue to conduct such activities until the proposed legislation is signed into law. Such activities cannot be condoned by the courts of this nation.

Petitioner's fate is in the hands of this Court, as is the fate of all women in similar situations. Petitioner presented her claims to the courts below, and entrusted her future to the wisdom of the Alabama Judiciary. However, the judicial mechanism in Alabama failed in this instance, denying Petitioner's claims based on sex discrimination and thereby violating her right to Equal Protection of the Law. The approval and encouragement of such actions must stop with this Court. Therefore, the Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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